



**NEW YORK STATE COMMISSION
ON CABLE TELEVISION**

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January 18, 1993

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 92-259

Dear Ms. Searcy:

I am enclosing herewith an original and nine copies of reply comments submitted by the New York State Commission on Cable Television in the above-referenced proceeding.

Very truly yours,


John L. Grow
Counsel

Encs.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the Cable Television
Consumer Protection and Competition
Act of 1992

Broadcast Signal Carriage Issues

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MM Docket No. 92-259

**REPLY COMMENTS OF THE NEW YORK STATE
COMMISSION ON CABLE TELEVISION**

New York State Commission
on Cable Television
Corning Tower Bldg.
Empire State Plaza
Albany, New York 12223
(518) 474-4992

Dated: Albany, New York
January 18, 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Implementation of the Cable Television)
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**REPLY COMMENTS OF THE NEW YORK STATE
COMMISSION ON CABLE TELEVISION**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

1. The New York State Commission on Cable Television ("NYSCCT") respectfully submits reply comments in response to the Notice of Proposed Rulemaking ("NPRM") released in this docket November 19, 1992. NYSCCT is an independent Commission with broad authority to promote and oversee the development of the cable television industry in the State of New York. NYSCCT is expressly authorized by Section 815(6) of the Executive Law of the State of New York to represent the interests of the people of the State before the Federal Communications Commission ("Commission").

2. NYSCCT addresses its comments only to new Section 615(d) (47 USC Section 535(d)) as added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act 1992"). Section 615(d) provides as follows:

"(d) **PLACEMENT OF ADDITIONAL SIGNALS.** - A cable television operator required to add the signals of qualified local noncommercial educational television stations to a cable system under this section may do so, subject to approval by the franchising authority pursuant to Section 611, by placing such additional stations on public, educational, or governmental channels not in use for their designated purposes."

In the NPRM in this docket, the Commission asks: "if a channel reserved for PEG programming is used to carry an NCE signal when no other channel capacity exists and a qualified PEG user later materializes, what procedures should be followed." (Para. 14) Certain commentors have addressed this issue.

3. In addressing the issue of unused PEG channels, Armstrong Utilities, Inc. ("Armstrong") asserts that "[a]ny NCE station placed on an unused PEG channel would take the channel on a 'may-carry' basis." (Armstrong, p. 8) NYSCCT agrees generally that neither the NCE station nor the cable operator would attain any preferred status to the PEG channel. Armstrong goes on to state that such NCE station "could be removed from the channel on 30 days prior notice in the event that a PEG user wished access." (Id., p. 8) Armstrong also urges the Commission to provide guidance for the definition of "unused" and appears to invite the Commission to include rules which could be construed to preempt franchising authorities from administering unilaterally their own PEG channel requirements.¹

4. The comments of the Consumer Federation of America and Media Access Project ("CFA/MAP") also respond to Section 615(d) and the Commission's invitation in paragraph 14 of the NPRM. At the outset, CFA/MAP states that it would "prefer that PEG channels not be used for programming other than PEG programming." (CFA/MAP, p. 10)

¹ Armstrong states "in lieu of two or three channels which scroll the same information, a cable operator should be permitted to place additional NCE stations on PEG channels which would otherwise exhibit wholly-duplicative 'billboard' notices." (Armstrong, p. 7) Armstrong states further that "[t]he Commission may wish to consider a rule providing for NCE use of a PEG channel if it is used rarely for live or taped purposes." (Id., p. 8) These are not matters for the Commission. (Infra, pp. 4, 5)

NYSCCT agrees. In the balance of its comments, CFA/MAP urges the Commission to promulgate rules governing actions by a franchising authority in respect to the use of PEG channels. In particular, CFA/MAP asks the Commission to "create a system to protect subsequent PEG programmers that may seek carriage in the future[.]. . .[in order to] . . . prevent PEG users from being permanently excluded from using their originally allocated PEG channels. . ." (CFA/MAP, pp. 11-12). However well intended these comments, NYSCCT does not agree that the Commission is authorized to adopt rules regulating PEG issues. Moreover, the assumption by CFA/MAP that PEG users can be relegated to secondary status by being forced to wait for a channel to "subsequently come available because of the additional channel capacity on the system or when programming is no longer available" is wholly unwarranted and inconsistent with Section 611 of the statute and with Congressional intent in enacting Section 615(d).

5. In fact, Section 615(d) adds nothing of substance to existing law and, therefore, does not empower the Commission to adopt rules concerning the decision of a franchising authority to authorize use of a PEG channel for NCE signals or to condition such actions. Section 611 of the Cable Act recognizes the authority of franchising authorities to require the designation and use of channel capacity for public, educational and governmental use. Section 611(d) provides specifically that:

"(d) in the case of any franchise under which channel capacity is designated. . ., the franchising authority shall prescribe - (1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other surfaces if such channel capacity is not being used for the purposes designated, and (2) rules and procedures under which such permitted use shall cease." (Emphasis added)

It is clear from this language that the designation and use of PEG channels is within the sole discretion of state and local franchising authorities. It follows, therefore, that the use of a PEG channel for the carriage of any service, including a noncommercial educational signal, has always been within the discretion of the franchising authority to approve.

6. Where a franchising authority has adopted "fallow time" rules, both the right of a cable operator to use the unused channel and the terms and conditions applicable to restoration of the channel to use by PEG users would be subject to such rules. There is no authority for Commission rules that would in any way supersede "fallow time" rules adopted by state or local franchising authorities. In this regard, NYSCCT, fully agrees with the comments of the Association of America's Public Television Stations ("AAPTS") that "[t]here appears to be little question but that the Commission cannot countermand the determination of the franchising authority to 'reclaim' the PEG channel." (AAPTS, p. 21) NYSCCT also agrees with the AAPTS that "unless the franchising authority otherwise agrees,. . .[whenever a PEG user materializes]. . .the cable system must displace another programming service, either a nonbroadcast station or a cable programming service, and continue to carry the noncommercial station." (Id, p. 21)

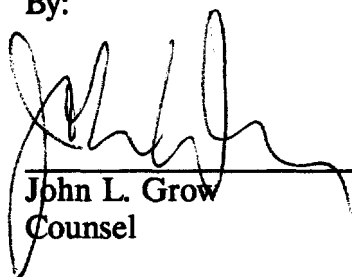
7. In sum, the decision whether a PEG channel is used or unused, as well as the decision whether a PEG channel can be used for the retransmission of an NCE signal, reside solely with the franchising authority. If an opportunity exists consistent with existing "fallow time" rules as adopted by the franchising authority (or as contained in the franchise), a cable operator may, at its risk, choose to use a channel for the retransmission of a NCE signal. Such action, however, would be subject in all respects to such "fallow time" rules.

In most cases, it is likely that a cable operator will be required to seek, or will choose to seek, specific action by the franchising authority, either in the form of clarification or some modification of applicable rules or franchise provisions. Of course, a franchising authority is under no duty to act upon such request, much less to grant approval for the carriage of an NCE station on a PEG channel. If the franchising authority determines to entertain such request and if the action requested constitutes an amendment to a franchise, then the matter would be governed by the same state or local procedure applicable to franchise amendments generally. Finally, the Commission may rule that a cable operator may not drop an NCE signal without thirty days' notice, but such rule would merely bind the cable operator and not, in any sense, supersede the requirements of a franchise or "fallow time" rules or otherwise serve to delay the use of the PEG channel by PEG users pursuant to such requirements.

Respectfully submitted,

NEW YORK STATE COMMISSION
ON CABLE TELEVISION

By:



John L. Grow
Counsel

Dated: Albany, New York
January 18, 1993

CERTIFICATE OF SERVICE

I, Theresa A. Cenci, do hereby certify that I have, this 18th day of January, 1993, caused copies of the foregoing "Reply Comments of the New York State Commission on Cable Television" to be served on the parties listed below by first-class, United States mail, postage prepaid:

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